

¹ At the post award hearing on May 10, 2005, the parties agreed the claimant's testimony provided at his discovery deposition could be considered as part of the evidentiary record.

his burden of proof to establish that certain prescription costs were related to his back condition.

The Special Administrative Law Judge (SALJ) determined that claimant's need for surgery was causally related to his accidental injury which was the subject of the underlying claim. Consequently, the SALJ appointed Dr. Abay as claimant's treating physician. The SALJ awarded claimant's attorney \$2,700 in attorney fees but determined claimant had not met his burden of proof for reimbursement of prescription costs.

The respondent requests review of whether the claimant's current condition is related to his work-related injury. Respondent argues that the court ordered medical examiner concluded the progression and worsening of claimant's back condition was based upon the natural aging process of claimant's degenerative disk disease and not his work related accident. Respondent further argues the SALJ's denial of reimbursement for the prescription costs should be affirmed because the doctor prescribing the medications was unable to state why the medication was needed or prescribed especially after the doctor had stopped seeing the claimant.

Claimant argues the worsening of his back condition was the natural and probable consequence of his work-related accident and the SALJ's award of medical treatment should be affirmed. Claimant further argues that his prescription costs should be reimbursed.

The issues for Board determination are whether claimant's need for additional medical treatment is the natural and probable consequence of his work related injury and whether claimant should be reimbursed for certain prescription costs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On October 1, 2002, the parties agreed to a compromise settlement of this claim for a lump sum with the right to future medical left open. The claimant described a gradual worsening of his low back pain and in 2003 sought treatment with Dr. Chandrasekhar Tokala, a board certified anesthesiologist. Dr. Chandrasekhar performed facet injections which initially provided claimant some relief from his chronic low back pain. Because the injections provided relief the doctor recommended radio frequency ablation. The procedure consists of placing a needle against the facet joint where the nerve passes through and using radio frequency waves to burn the nerve and deaden it. On September 4, 2003, a hearing was held on claimant's request for additional medical treatment for his back. The requested treatment, radio frequency ablation, was ordered and was performed on September 26, 2003.

Unfortunately, the radio frequency facet rhizotomy did not provide claimant relief from his back pain. In 2004 the claimant returned to Dr. Eustaquio Abay. Following examination of claimant, Dr. Abay recommended claimant have a surgical laminectomy decompression with fusion of L5-S1. A post-award hearing was scheduled for October 26, 2004, and resulted in an Order dated October 27, 2004, appointing Dr. Paul S. Stein to perform an independent medical examination of claimant. The Order directed Dr. Stein to determine whether surgery was appropriate for claimant's low back condition and whether claimant's low back condition was the result of his work related injury or the natural aging process of that injury or other unrelated causes. Dr. Stein agreed the recommended surgery was reasonable but that the progressive worsening of claimant's low back pain was the result of the degenerative process and not the claimant's work activity for respondent.

A post-award hearing was held on May 10, 2005, on claimant's request for the recommended back surgery. Before a decision was entered on that request another post-award hearing was held on August 2, 2005, on claimant's request for reimbursement of certain prescription costs. At the latter hearing it was agreed that the SALJ consolidate the two post-award proceedings.

Between October 2002 and 2004, the claimant testified that he had not been involved in any accidents or injuries. But claimant noted that he experienced a progression of more low back pain and some leg numbness. The claimant further testified:

Q. Okay. Tell me about your medical condition since we settled your claim, which was back in October, 2002. How's your back been since then? And bring me from then up to the present date, if you will.

A. We did have a treatment, and I'm not sure what the name of the treatment was, but it was to go in and deaden the nerve that sent pain signals to my brain. It didn't work as well as what we had hoped and so I remained on my medication. Up to this point that's as far as it's gone.²

The claimant stated he has continual pain and that it varies in degree from day to day. Claimant currently has his own business where he can take a break or not do anything when his back is hurting.

After claimant suffered his work-related injury he saw Dr. Abay in May 2001. In July 2001 when Dr. Abay last saw claimant he noted that back surgery had been discussed but it was determined that conservative treatment was initially the preferred treatment. When Dr. Abay examined claimant in August 2004 he noted that claimant's low back symptoms had worsened but no significant objective changes were demonstrated by radiographic studies. Because claimant's symptoms had worsened and conservative treatment was not

² Hastings Depo. at 6-8.

successful the doctor recommended surgery and concluded that claimant's condition was the result of his work-related accident. The doctor testified:

Q. Can you give this Court an opinion within a reasonable degree of medical probability whether or not your opinion in August of 2004, that the claimant would benefit from your surgical procedures as recommended in your medical records, is more probably than not related to the same work history?

A. Right, the surgery that we finally discussed in August of 2004 was essentially the same surgery that we discussed as a possible option in July of 2001. I don't know if that answers your question.

Q. So do you have an opinion within a reasonable degree of medical probability whether or not that recommendation in 2004 was work-related or not?

A. More probably than not, yes.

Q. That it was work-related?

A. That it was work-related.³

Dr. Abay further explained the claimant's increased symptoms were because conservative treatment failed. Dr. Abay testified:

Q. Okay, I think I understand. To what do you attribute the increased level of pain in August, 2004 without the increased level of additional objective injury or problems or findings?

A. Well, if the condition is severe enough to cause symptoms, and unfortunately if it's not resolved as far as to causation of the symptoms, then there is a tendency in fact for symptoms to gradually become worse. As the symptoms become chronic, the tolerance of a patient to the same nagging pain becomes less and less, there is also a tendency for a vicious cycle to be initiated, pain, more spasms, more pain, you get depressed about the fact that you are in pain, so it becomes worse, so at each turn the symptomatology in the cycle goes into a downward spiral so to speak, so this explains why most chronic problems are difficult to treat because of that.

Q. And is it your opinion here today that that's more probably true than not what happened with this particular patient, the spiral that you just described?

A. Again, more probably than not, that is correct.⁴

³ Abay Depo. at 11-12.

⁴ *Id.* at 27-28.

Dr. Paul Stein was designated to provide an independent medical examination of claimant. Dr. Stein examined claimant on April 7, 2005, and prepared a report detailing his examination. In his report of that examination Dr. Stein agreed that the recommended back surgery was reasonable and he further noted in pertinent part:

The degenerative disease clearly was preexisting the aggravation at Boeing but was apparently asymptomatic. The work activity with repetitive bending may have caused it to become symptomatic but is not likely to have caused any significant structural change. The pain in 1998 and persistent pain at that level thereafter may be considered related to work activity. Any progression, that is worsening of pain or increase in the degenerative change on radiologic studies, is not related to the Boeing activity but to the degenerative process itself.⁵

Dr. Stein agreed that claimant's low back degenerative disk disease became symptomatic as a result of his work-related accident and that a natural consequence of aggravation of the degenerative disk disease would be a waxing and waning of symptoms. Moreover, the doctor agreed that the need for a medical procedure such as the rhizotomy was a natural and probable consequence of the work-related aggravation of the degenerative disk disease. But Dr. Stein noted it was a more difficult question whether the current need for surgery was a natural and probable consequence of the original injury. The doctor explained:

Q. And so to take it one step further then, isn't the natural and foreseeable consequence of the aggravation of the preexisting degenerative disc disease in this case is the need for additional medical treatment in the form of the surgery?

A. That's actually a difficult question. If the need for surgery at this time is because his pain never got better and he's just gotten tired of dealing with it, then, yes, absolutely. He's had the pain since then, he still has the pain. There are people who avoid having surgery until they just get to a point where they say, okay, I'm tired of this. If we are talking about a progression of pain years after the work has stopped and a true - - I'm not talking about a waxing and waning now. I'm talking about a steady, progressive deterioration, that's probably just as much a natural progression of the degenerative process rather than the specific injury.

Q. Well, but in the second scenario, the work-related injury would contribute to the need for the surgery; correct?

A. Contribute because it was the origin of the symptoms, that's correct.⁶

⁵ Stein Depo., Ex. 2 at 7.

⁶ *Id.* at 20-21.

Finally, Dr. Stein testified that if claimant was a candidate for surgery in 2001 then his need for surgery now would be related to the original injury.

Dr. Chris D. Fevurly examined claimant on April 11, 2002, and October 15, 2004, at the request of respondent's attorney. After the April 11, 2002 examination, Dr. Fevurly opined the claimant was at maximum medical improvement and not a surgical candidate at that time. After the October 15, 2004 examination, Dr. Fevurly noted claimant's low back pain as well as right leg pain occurred on a more frequent basis than noted during the 2002 examination. Dr. Fevurly opined that claimant's current need for surgery would be due to the natural progression of the claimant's degenerative disk disease and his heavy labor but not related to his prior work activities with respondent. But Dr. Fevurly agreed he did not know how heavy the furniture was that claimant handcrafted.

K.S.A. 44-510k provides that further medical care for a work-related injury can be ordered based upon a finding such care is necessary to cure or relieve the effects of the injury which was the subject of the underlying award.

The controlling issue is whether claimant's present need for additional medical treatment including surgery for his low back complaints is directly and naturally related to the injury suffered at work for respondent.

When a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁷ The Board acknowledges that where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause, it would not be compensable.⁸

In *Jackson*⁹, the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1)

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*, the Court attempted to clarify the rule:

⁷ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁸ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

⁹ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.¹⁰

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*¹¹, the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*¹², the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

In *Logsdon*¹³ the Kansas Court of Appeals reviewed the foregoing cases and noted a distinguishing fact is whether the prior underlying injury had fully healed. If not, subsequent aggravation of the injury even when caused by an unrelated accident or trauma may still be a natural consequence of the original injury.

In this case Dr. Abay concluded that claimant's underlying injury had not responded to conservative treatment and that claimant's current condition and need for surgery was caused and directly related to the underlying injury. The claimant continued to receive treatment for his back after his claim was settled. And he continued to take pain relieving medication as well as undergoing a procedure to deaden the nerves. When the various treatment modalities failed claimant was then left with the option to have surgery. The

¹⁰ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

¹¹ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

¹² *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, rev. denied 231 Kan. 800 (1982).

¹³ *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

claimant's low back pain has persisted and been consistently present despite the various conservative treatment efforts.

Respondent requests the Board to adopt the opinion of Dr. Stein that the progressive worsening of claimant's back condition was not related to the underlying accident but instead due to the natural aging process of his degenerative disc disease. It is interesting to note that Dr. Stein agreed that claimant's need for the radio frequency ablation was a natural and probable consequence of the underlying injury but when that failed that the recommended surgery was not. Nonetheless, Dr. Stein agreed that the underlying injury at a minimum contributed to claimant's need for surgery. And Dr. Stein agreed that if claimant was a candidate for surgery in 2001 then his need for surgery now would be related to the underlying original injury.

The Board finds Dr. Abay's opinion more persuasive in this case. Dr. Abay had discussed surgery as an option but recommended that claimant initially undergo conservative treatment. It was noted that if those conservative treatment modalities failed then surgery would be appropriate treatment. And although claimant's pain waxed and waned over time, nonetheless, it never went away and was probably alleviated at times by the medication the claimant continued to take. The Board affirms the SALJ's decision that claimant's current condition and need for surgery is the natural and probable consequence of the underlying original work-related injury.

Claimant requested reimbursement of \$768.58 of certain prescription costs. The SALJ determined that claimant failed to meet his burden of proof to establish that the prescriptions were related to claimant's accident. The prescriptions were written by several physicians including Dr. Tokala. But Dr. Tokala was the only physician that testified regarding the prescriptions. Dr. Tokala indicated that some of the medications were pain relievers for claimant's back pain but interestingly he last saw claimant November 13, 2003, and the majority of the prescriptions were written in 2004. The doctor explained why he continued to prescribe pain medications for claimant in the following colloquy:

Q. If Mr. Hastings was last seen in this office on November 18th, 2003, is it your practice then to prescribe medication for a patient that you never see or evaluate personally?

A. Sometimes, yes.

Q. They can just call in and say, I'm out of medicine and you write it?

A. This case is a little different than the other cases. The reason being, his wife works at St. Joseph Hospital. And if there is any problems she usually comes to us

and I usually talk to him over the phone and see how he's doing. Then if he continued to have pain, then we continue to refill his pain medication.¹⁴

The doctor further explained that although his records did not indicate when such conversations occurred it was not his practice to chart such phone calls.

The claimant has met his burden of proof to establish that the prescriptions written by Dr. Tokala were for his ongoing back pain after the failed radio frequency ablation procedure. However, the claimant failed to meet his burden of proof regarding the prescriptions written by the other doctors as Dr. Tokala could only speculate regarding why those prescriptions were written. Consequently, claimant is entitled to reimbursement of \$677.06 for the prescriptions written by Dr. Tokala for his back pain.¹⁵

AWARD

WHEREFORE, it is the decision of the Board that the Award of Special Administrative Law Judge Marvin Appling dated April 27, 2006, is modified to award claimant reimbursement of \$677.06 for prescriptions and affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of August 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Frederick L. Haag, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Director & ALJ files

¹⁴ Tokala Depo. at 15-16.

¹⁵ *Id.*, Ex. 1.